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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

JOHN G. PRICE AND
DAVID G. PRICE,

PETITIONERS,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a defendant should be able to choose which version of the Sentencing Guidelines Manuel is applicable at re-sentencing when there has been a change in the guidelines.

2. When a sentence is vacated on appeal can the defendant at re-sentencing raise new issues and re-argue previous issues?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The original opinion (Price I) of the U.S. Court of Appeals appears at Appendix A to the petition and is reported at 65 F.3d 903 (11th Cir. 1995), cert. den. 116 S.Ct. 2547(1996), The Opinion of the U.S. Court of Appeals after remand (Price II) is unpublished and appears at Appendix B.

JURISDICTION

The judgment of the Court of Appeals (Price II) was entered on November 3, 1997, and appears at Appendix B. A timely petition for rehearing was denied on April 2, 1998, and appears at Appendix C. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution (Appendix D), U.S.S.G. Section 5K2.8 (Appendix F), 18 U.S.C. § 3553 (Appendix E), U.S.S.G. § 3A1.1(Appendix G).

STATEMENT OF THE CASE

On July 16, 1993, John and David Price were convicted in the Middle District of Alabama for conspiracy to commit murder, and for the use of interstate commerce facilities with the intent to commit murder for hire. John Price was also convicted of solicitation to commit a crime of violence. R4-127-1, R4-126. This was a second trial for the petitioners. The first trial ended in a hung jury.

On February 15, 1994, John Price was sentenced to 360 months imprisonment and fined a total of $880, 752.40 consisting of a $250,000.00 fine and a cost of incarceration amount of $630,752.40. (R5-210-1). David Price was sentenced to 300 months imprisonment and fined a total of $726,712.40 consisting of a $200,000.00 fine and a cost of incarceration amount of $526,712.40. R5-208-1.

Petitioners John and David Price, (ages 63 and 41 respectfully at the time of arrest in 1993), are father and son. John Price was president of Price Rubber Corporation headquartered in Montgomery, Alabama. David was an employee and ran the Arlington, Texas operation. Prior to this offense neither had ever been arrested for any criminal offense.

This case arose out of a government sting operation orchestrated by a large scale drug smuggler turned government operative who was facing the possibility of life in prison. The operative was Bobby Price, Jr., who is no

relation to the petitioners but was acquainted with them because he was a former employee.

The petitioner's defense at trial was entrapment.

The defendants appealed the above conviction and sentence. On September 29, 1995, the Eleventh Circuit affirmed the conviction (Price I) but vacated the sentence and remanded the case to the district court for resentencing. United States v. Price, 65 F.3d (11th Cir. 1995), cert. den., 116 S.Ct. 2547 (1996).

On September 10, 1996, the District Court resentenced the defendants to the same sentence as before. The court also recommended to the Bureau of Prisons that the defendants be incarcerated in separate maximum security facilities. (R1-242, 243-1) (new record). A second appeal was taken and the Court of Appeals affirmed (Price II) in an unpublished opinion - United States. v. Price, CA No. 96-6954 (Nov. 3, 1997) (See Appendix B).

REASONS FOR GRANTING THE PETITION

1. Whether a defendant should be able to choose which version of the Sentencing Guidelines Manuel is applicable at re-sentencing when there has been a change in the guidelines.

At the original sentencing in February, 1994, the District Court imposed an upward departure, based in part, on a racial and ethnic motivation behind the crimes, by both defendants, pursuant to U.S.S.G. 5K2.8 (1993 Edition) (extreme conduct). That departure was based upon an aggravating circumstance of a kind or degree not adequately taken into consideration by the Sentencing Commission in formulating the guidelines. 18 U.S.C. 3553(b). The 1993 Sentencing Guidelines Manual did not take racial animus into account.

The Court of Appeals (in Price I) held that the District Court's finding that Defendants' actions were racially motivated was not clearly erroneous because there was evidence that although the "two primary motivators for the Prices' conduct were greed and business litigation, ... racial and ethnic prejudice also played a part." Price, 65 F.3d at 910. The only direct evidence alleged against John Price was that he made anti-semitic remarks about Mr. Capouano and Jewish persons in general. Price, 65 F.3d at 910. The only evidence alleged against David Price was that in attempting to intimidate Mr. Capouano, Defendant used ethnically biased and threatening terms in graffiti at Mr. Capouano's home.

On November 1, 1995, the United States Sentencing Commission added subsection (a) to U.S.S.G. 3A1.1 which increases a defendant's offense level by three if a defendant intentionally selects any victim because of the victim's actual or perceived race or ethnicity. Before applying this Guideline, the finder of fact must determine beyond a reasonable doubt that the defendant intentionally selected the particular victim based upon one of the listed characteristics, i.e., race, ethnicity, etc.

At the time of the petitioners resentencing in September 1996, Section 3A1.1, U.S.S.G. had been amended (1995 Edition) and the defendants sought to be sentenced under the amended version to Section 3A1.1. The trial court failed to sentence defendant's under that amended version. In the original sentencing proceeding, the District Court did not make any finding that Defendants intentionally selected a victim based upon his race, etc. as now required by 3A1.1(a).

The Court of Appeals in Price II held that amended Section 3A1.1, U.S.S.G., should not have been considered by the trial court because it "could have" resulted in a harsher sentence to the petitioners. (A three level increase rather than a two level increase) See page 4 of the Opinion (Price II) dated November 3, 1997. (Appendix B).

Title 18 U.S.C. 3553 (a)(4)-(5) provides that sentencing should be based on the sentencing guidelines that are in effect at the time of sentencing. Amended 3A1.1 was

in effect at the time the petitioners were resentenced in 1996. Moreover, amended 3A1.1 requires proof beyond a reasonable doubt. In contrast, the finding of extreme conduct under 5K2.8 may be based on a preponderance of the evidence. Thus, this Court's prior finding depended on what is now an improper burden of proof.

The Court of Appeals finding that the petitioners "could have" been sentenced to a three level upward departure under the amended version rather than the two levels previously imposed by the trial court is speculation. The trial court never made any finding that the petitioners could be enhanced based upon the strict requirement of the amended guideline and the particular facts in the instant case. The court's finding that "racial and ethnic prejudice ... played a part" in motivating the Prices' conduct demonstrates that this case does not fit the current criteria of U.S.S.G. 3A1.1(a), which imposes a substantial three-level increase on an offender when the government can establish beyond a reasonable doubt that a defendant intentionally selected the particular victim based upon the victim's racial or ethnic identity. Therefore, it is a denial of the due process rights to the petitioners pursuant to the Fifth Amendment of the U.S. Constitution to deny them that finding.

The petitioners should have been sentenced under the guideline version that is most beneficial to them when there is a choice of guideline versions as there was in this case and it is manifestly unjust to deny them that right.

The Court of Appeals also indicated that to sentence the petitioners under the amended guideline may be a violation of the ex-post facto prohibition. The petitioners never claimed any ex-post facto violation and if there was a such a claim available they waived it by requesting to be sentenced under the new guideline version. It goes without citation that one may knowingly and voluntarily waive any perceived right.

There is no argument against the proposition that the guideline version in effect at time of sentencing should be applied, or that the courts have carved out an exception to that rule if the amended version could result in a harsher sentence. Price II (Appendix B, page 4 of the Opinion). But petitioners are unable to find any cases on point as to whether the defendant rather than the court is the one who can make the choice as to which version of the sentencing guidelines should be applicable when there has been a change in the guidelines even if there is a possibility of a harsher sentence. A defendant has the right to require the Government to meet their burden of proof. Petitioners believe this issue to be an issue of exceptional importance and is bound to reoccur in the future in regards to other defendants.

Therefore, the petitioners request that this Court grant certiorari and issue an opinion that a defendant should have the choice as to which version of the sentencing guideline should be applicable at resentencing when there has been a change in the guidelines between sentencings.

2. When a sentence is vacated on appeal can the defendant at re-sentencing raise new issues and re-argue previous issues?

The petitioners contend that the District Court, in the original sentencing and in the resentencing. erred in (1) enhancing John Price's base offense level based on significant planning and threat of severe harm to a victim; (2) not granting a downward departure based on the alleged imperfect entrapment of the defendants; and (3) imposing consecutive ten year sentences that amounted to a life sentence in alleged violation of 18 U.S.C. § 1958. The Court of Appeals held that petitioners could have raised these arguments on the first appeal, but they failed to do so. Price II (appendix B, p.6 of the Opinion.

The petitioners also re-argued at the resentencing the same issues raised at the original sentencing. The Court of Appeals held that their:

> "remand to the district court was limited and the Prices' entire sentencing packages were not to be revisited on remand. Price, 65 F.3d at 912; see Tamayo, 80 F.3d at 1519-20 n.7 (finding that the Eleventh Circuit "has been explicit when it is vacating an *entire* sentencing package as opposed to remand for sentencing on a single issue"). The Prices are deemed to have waived those arguments that they raise for the first time on this appeal, and therefore, we will not consider the arguments.

Price II, (Appendix B, p.6 of the opinion.

The Appeals Court also held that the law of the case doctrine applied to these issues, and they were bound by the earlier decisions.

The Court of Appeals holding that new issues could not be considered by the sentencing court or the Court of Appeals or that previous issues could not be reargued appears to conflict with the holding in United States v. Stinson, 97 F.3d 466 (11th Circuit 1996) cert. den., 117 S.Ct. 1007 (1997). Stinson held that"when a criminal sentence is vacated, it becomes void in its entirety; the sentence . . .has 'been wholly nullified and the slate wiped clean.'" Id. at 468. In Stinson, the government's argument for an upward departure at sentencing failed. The defendant appealed and the sentence was vacated. The Government did not raise the upward departure issue on appeal, but at resentencing again raised the issue and this time it was granted. Stinson held this was proper since the sentence was vacated.

The petitioners content that vacatur of the sentence means the entire sentence has been voided and an entirely new sentencing proceeding should take place with the right to raise new issues and reargue old ones.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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John G. Price

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Counsel of Record for
David G. Price

July 1, 1998

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

David G. PRICE, Defendant-Appellant.

UNITED STATES of America,
Plaintiff-Appellee,

v.

John G. PRICE, Defendant-Appellant.
Nos. 94–6141, 94–6152.

United States Court of Appeals,
Eleventh Circuit.

Sept. 29, 1995.

Appeals from the United States District Court for the Middle District of Alabama.

Before COX, Circuit Judge, RONEY and WOOD*, Senior Circuit Judges.

PER CURIAM:

John and David Price were convicted for conspiracy, in violation of 18 U.S.C. § 371 (1988), to commit murder and for the use of interstate commerce facilities in violation of 18 U.S.C. § 1958 (1988), with the intent to commit murder-for-hire. John Price was also convicted of solicitation to commit a crime of violence in violation of 18 U.S.C. § 373 (1988), while David Price was separately convicted for using interstate commerce facilities in violation of 18 U.S.C. §

1958 (1988), with the intent to commit murder-for-hire.[1] John Price was sentenced to 360 months imprisonment and fined. David Price was sentenced to 300 months in prison and was ordered to pay fines as well. The Prices appeal, challenging their convictions and their sentences. We affirm their convictions but vacate their sentences and remand for resentencing.

I. FACTS AND PROCEDURAL HISTORY

John Price was president of Price Rubber Corporation, a business headquartered in Montgomery, Alabama. His son David managed a Texas rubber plant owned by the company. Several business-related incidents gave rise to the convictions now at issue.

Before establishing operations in Montgomery, John Price owned a rubber warehouse and distribution center in Auburn, Georgia. That facility burned in 1974, causing Price a three million dollar uninsured loss. The Prices have always believed that Auburn resident David Hawthorne was responsible for the arson. Nothing came of their suspicions for a time, however, because shortly after the fire, the Prices left Auburn and moved to Montgomery to found Price Rubber.

The Prices acquired more perceived enemies when, in 1986, Sy Shafer and Ellis Lucas sold their printing concern, Pioneer Press, to Kenny Price, John Price's nephew. Kenny was affiliated with the Prices' enterprise, and he ran the

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* Honorable Harlington Wood, Jr., Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

[1] Both Prices were charged with tampering with witnesses, in violation of 18 U.S.C. § 1512(b)(2)(A) (1988), but were acquitted on those two counts.

printing business "parallel" to the principal rubber operation. (Gov't Ex. 6 at 17-18.) Shafer and Lucas retained Leon Capouano, a Montgomery lawyer, to handle the sale of Pioneer Press.

The acquisition proved troublesome for the Prices. The parties to the deal became involved in litigation, and ultimately Shafer and Lucas obtained a money judgment against Pioneer Press and Kenny Price. Litigation continued through 1992; Sy Shafer had filed two suits directly against John Price by the fall of 1991. Family relations turned so sour that John Price fired nephew Kenny, on the belief that he was stealing from the company. After his severance from the Price empire, Kenny became a prospective witness for Sy Shafer against his uncle.

Further problems arose for Price Rubber in 1991, when Internal Revenue Agent Dwight Huff initiated an examination of the company's tax records. Though routine, the review spanned the next two years, in part because of the failure of Price Rubber to timely provide information necessary for the audit's completion.

Not found of lawyers, John Price and his son David decided to bypass legal recourse and deal with their woes through a sinister plot to pay back their perceived enemies by hiring hitmen to wreak various degrees of havoc upon them. Bobby Price (unrelated to, but acquainted with John and David Price) was the Prices' initial contact with the underworld.[2] In November, 1991, David Price visited Bobby's auto body shop in Montgomery. At this meeting, David

[2] Bobby Price had worked for the Prices during 1983-1984 and again during 1987. During those times, Bobby knew both Prices and had become friends with David Price.

handed Bobby $2000 and instructed him to find "the right people" to blow up Leon Capouano's law office and to kill David Hawthorne in Auburn, Georgia. (R. 18 at 329.) Later, David mailed Bobby two packages which contained maps, photographs, and other information about Capouano and Hawthorne. The second parcel also contained a note indicating that David Price had two more names to add to the "hit list," apparently Kenny Price and Sy Shafer.

Meanwhile, Bobby Price was arrested July 8, 1992, for trafficking in marijuana. In exchange for a lighter sentence, Bobby struck a deal with the government, eventually providing information about the Prices' murder-for-hire plot.[3] After his agreement with the government, the federal agents orchestrated a meeting on August 14, 1992, between Bobby Price and David Price, during which David told Bobby that Kenny Price and David Hawthorne were still prime targets. David also took Bobby out to Elmore County, Alabama, to "case" Kenny's trailer. David paid Bobby $1500, and Bobby explained that he had two friends (FBI special agents) who would be willing to do these jobs for the Prices.

One week later, Bobby had a similar meeting with John Price. There, John expressed his desire to have Kenny "busted up pretty good," (Gov't Ex. 2 at 59), though he expressed hesitation about killing his nephew outright. As for David Hawthorne, John stated that "the guy needs to be rubbed out.

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[3] Bobby provided information regarding drug traders in the Montgomery area during "debriefing sessions" held in July, 1992. He did not mention John and David Price until August 4, 1992, after the debriefing agents demanded to know about phone calls made to Arlington, Texas. (R. 18 at 339-42.) Those calls were to David Price and concerned the activities at issue in this case.

No question about that." (*Id.* at 62.)[4]

By September 16, Bobby had introduced David Price to the undercover FBI agents, and meetings between the participants continued through the fall of 1992. During these meetings, the murders of Kenny Price, David Hawthorne, and Sy Shafer, as well as the bombing of Leon Capouano's law office, were planned and paid for by John and David Price.[5] Finally, John Price sent a letter to the agents in January, 1993, requesting the "well damaged carcass" of IRS agent Dwight Huff, in retaliation for the inconvenience caused by the audit of Price Rubber. (Gov't Ex. 63.)

The last meeting between the federal agents and John Price occurred on January 27, 1993, in Montgomery. There the agents told Price that the first murder, that of Sy Shafer, had been completed, and they showed him pictures of what they said was the body. John Price paid the agents $20,000 and expressed enthusiasm about the imminent success of the remaining jobs. Later that day, he and son David were arrested.

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[4] John Price was more reluctant than his son to order the murder of their targets. Instead, he graphically described how he would rather have them mutilated, so that they would have to live with the damage for the rest of their lives. Still, John Price was at best indifferent to his targets' survival: "... if [Hawthorne] should ... should die I don't give a shit... " (Gov't Ex. 2 at 66; Gov't Ex. 6 at 24-25.)

[5] The Prices' plans became more grandiose as time passed. By December, 1992, John Price sent the agents a "menu" of possible services for the agents to perform and the payments he would make for each. (R. 17 at 189-92.) Later, Price referred back to the menu to describe what he wanted done to two attorneys, Dennis Pentazis and Tim Davis, who were involved in litigation against him. (R. 17 at 198; 18 at 230.)

A grand jury in the Middle District of Alabama indicted the Prices jointly, and the case went to trial in June, 1993. The Prices were acquitted on two counts of witness tampering, but the jury was unable to reach a verdict on the other counts. As a result, a mistrial was declared as to those counts. Retrial began in July, 1993, and the jury returned guilty verdicts against both defendants on the remaining charges. The Prices filed a motion for a new trial, which alleged, among other things, that juror misconduct deprived them of a fair trial. The court questioned the jurors *in camera* to investigate the alleged improprieties, and some instances of misconduct were found. The judge ruled that none of the incidents prejudiced the defendants' rights and denied the motion for a new trial.

David Price was sentenced to a total of 300 months in prison, a period of supervised release, and was fined $726,712.40, which included a fine of $200,000 and costs of incarceration and supervision. David was also ordered to pay a $200 assessment and restitution of $350 to Leon Capouano. In calculating David Price's sentence, the court applied an upward adjustment based on its finding that he obstructed justice by giving false testimony at trial. *See* United States Sentencing Commission, *Guidelines Manual* § 3C1.1 (Nov. 1992).

John Price's sentence consisted of a total of 360 months in prison and a period of supervised release. Additionally, John Price was fined $880,752.40, comprised of a $250,000 fine and costs of incarceration and supervision. He was also ordered to pay $350 in restitution to Capouano.

In calculating both Prices' sentences, the trial judge found that a two-level upward departure was warranted

because of the racial and ethnic motivation behind the crimes, the severe psychological injury to the victims, and the threat of harm to third parties. The Prices appealed.

II. ISSUES ON APPEAL

The Prices raise several issues on appeal. They contend that: (1) the trial court's denial of their motions for acquittal was erroneous because they were entrapped as a matter of law; (2) the trial court's imposition of cost-of-confinement fines violated the Fifth and Eighth Amendments to the Constitution; and (3) the court misapplied the sentencing guidelines when it calculated their sentences.[6]

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[6] The Prices also argue that the trial court improperly denied their motions for a new trial after allegedly prejudicial juror misconduct was discovered.. They further claim that the trial court abused its discretion in the manner in which it conducted its investigation of the possible misconduct.

The Prices allege several acts and omissions by the trial court which they contend deprived them of a fair trial. They claim that: (1) the trial court's entrapment instruction was inadequate; (2) the trial court erred by removing from evidence the Attorney General's guidelines on FBI Undercover Operations; (3) the court erred by not allowing the defense to have an unredacted copy of informant Bobby Price's diary; and (4) the diary and other information were required to be disclosed under *Brady v. Maryland*, 373 U. S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). They also attack the trial court's admission into evidence of a photograph containing inflammatory racial and ethnic matter, the trial court's instruction given to remedy "improper" remarks made by the prosecutor, and, finally, the judge's failure to recuse himself prior to sentencing because of death threats purportedly made by the Prices.

David Price separately argues that it was error for the district court to enhance his sentence under U.S.S.G. § 3C1.1 on the ground that Price obstructed justice by perjuring himself during the trial.

All these contentions are without merit and do not warrant further discussion. *See* 11th Cir.R. 36-1.

III. DISCUSSION

A. *Entrapment*

The Prices invite us to overturn their convictions, arguing that the district court should have granted their motions for acquittal because the government's evidence was insufficient to negate their entrapment defense. Their argument on this issue fails.

[1,2] Entrapment is generally a jury question. *United States v. Brown*, 43 F.3d 618, 622 (11th Cir.1995) (citing *Mathews v. United States*, 485 U.S. 58, 61, 108 S.Ct. 883, 886, 99 L.Ed.2d 54 (1988); *United States v. Costales*, 5 F.3d 480, 487 (11th Cir.1993)). Therefore, appellate review of a defendant's contention that he was entrapped as a matter of law is a sufficiency of the evidence inquiry, limited to deciding whether the evidence was sufficient for a reasonable jury to conclude that the defendant was predisposed to take part in the illicit activity. *Brown*, 43 F.3d at 622 (citing *United States v. Aibejeris*, 28 F.3d 97, 99 (11th Cir.1994)). Review is de novo, but we must view all facts and make all inferences in the government's favor. *Id.* (citing *Aibejeris*, 28 F.3d at 98). We cannot overturn a verdict if any reasonable construction of the evidence would allow the jury to find the defendant guilty beyond a reasonable doubt. *Id.* (citing *United States v. Ventura*, 936 F.2d 1228, 1230 (11th Cir.1991)).

[3, 4]A valid entrapment defense consists of two elements: government inducement and the defendant's lack of predisposition to commit the crime prior to the inducement. *Mathews*, 485 U.S. at 63, 108 S.Ct. at 886 (citations omitted). While the burden of production rests with the defen-

dant to show inducement, once that showing is made, the burden shifts to the government to prove beyond a reasonable doubt that the accused was predisposed to commit the crime. *Brown*, 43 F.3d at 623.

To establish government inducement, an "element of persuasion or mild coercion" is necessary. *Id.* In this case, there are numerous instances of government attempts to persuade or pressure John and David Price to commit the crimes they planned. For example, Bobby Price invoked his relationship with the Prices in offering to pay them back for past favors by arranging the murders of the Prices' enemies. A reasonable jury could have believed that such pressure induced the Prices to put their schemes in motion, so the court properly decided to charge the jury on entrapment.

The flaw in the Prices' argument is their contention that no reasonable jury could conclude that they were predisposed to engage in their murder-for-hire plot. They argue that they were not "disposed" to commit the crimes charged until after the initial contact with government agents. The Prices correctly assert that "one may not become unentrapped when the disposition arises after entrapment," (Appellant John Price's Br. at 24), and they claim, based on excerpts from the conversations they had with Bobby Price and the FBI agents, that they were reluctant to take part in the murder-for-hire scheme until after government persuasion.

Predisposition is "necessarily a fact-intensive inquiry because it is a subjective inquiry into a defendant's state of mind." *Brown*, 43 F.3d at 625 (rejecting five-factor list used by other circuits in reviewing predisposition in favor of case-by-case analysis). To show predisposition, the government

must prove beyond a reasonable doubt that "the defendant was actually predisposed to commit the underlying crime absent the government's role in assisting such commission." *Aibejeris*, 28 F.3d at 99 (citing *Jacobson v. United States*, 503 U.S. 540, 547-49, 112 S.Ct. 1535, 1540, 118 L.Ed.2d 174 (1992)); *see also Brown*, 43 F.3d at 624-25 (endorsing approach based on defendant's "readiness and willingness" to commit the crime; listing several "guiding principles" to use in reviewing predisposition findings, such as jury consideration of demeanor and credibility evidence).

[5] We cannot say that the evidence was insufficient for the jury to conclude beyond a reasonable doubt that the Prices were predisposed to commit the crimes of which they were convicted. While some statements made by both John and David Price suggest hesitation to go as far as murder, there are other indications of their readiness and willingness to have their perceived enemies maimed or killed. Significantly, David Price met with Bobby Price and made the first "downpayment" for their series of "hits" in November, 1991, long before Bobby became a government agent. In negotiating with the FBI agents about their fees, both John and David Price made reference to payments previously given to Bobby. This further suggests that the Prices' disposition arose before government agents allegedly pressured them to discuss murder.

B. *Sentencing Issues*

The Prices attack several aspects of their sentences. They argue that the fines imposed to pay for costs of incarceration and supervision are unconstitutional, and they also contest the two-level upward departure that the trial judge found was merited because of the nature of the Prices'

plans and actions.

1. Cost-of-Confinement Fines

[6] The Prices argue that the fines levied upon them pursuant to U.S.S.G. § 5E1.2(i) to pay for costs of incarceration are excessive under the Eighth Amendment and violate due process under the Fifth Amendment because they are not rationally related to the purposes of the Sentencing Reform Act. The Prices argue that U.S.S.G. § 5E1.2(i), which provides for cost-of-incarceration fines, and 18 U.S.C. § 3553(a) (1988), which states that courts shall "impose a sentence sufficient, but not greater than necessary," are in conflict, since § 5E1.2(i) imposes an "additional" fine on top of the fine ranges contained in the table provided by § 5E1.2(c).[7] The government, on the other hand, asserts that the fine is neither excessive nor irrational. Such questions of law are subject to plenary review. *See United States v. Weaver,* 920 F.2d 1570, 1573 (11th Cir.1991).

[7] The validity of U.S.S.G. § 5E1.2(i) is an issue of

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[7] The Prices argue that such a fine is by definition excessive under the Eight Amendment. We reject their argument. The penalties levied on the Prices are neither excessive nor grossly disproportionate to the crimes committed, see *Alexander v. United States,* —— U.S. ——, ——, 113 S.Ct. 2766, 2770, 125 L.Ed.2d 441 (1993); *United States v. Elkins,* 885 F.2d 775, 789 (11th Cir.1989), *cert. denied,* 494 U.S. 1005, 110 S.Ct. 1300, 108 L.Ed.2d 477 (1990), and so pass muster under the Eighth Amendment. Indeed, a fine based on a criminal's stay in prison seems to be by definition proportional to the crime committed. The Prices also argue that it is excessive to require them to pay for their imprisonment costs when they have yet to incur them. This argument is beside the point as well, since the fines are meant to penalize their criminal actions, not to pay the bills as they accrue while in prison. Also, the money will go not to their prison facilities but to the Crime Victims Fund, 42 U.S.C. §§ 10601 to 10603 (1988).

first impression in this circuit, and other circuits are split on the question. *Compare United States v. Spiropoulos*, 976 F.2d 155, 165-67 (3rd Cir.1992) (holding § 5E1.2(i) to be inconsistent with Sentencing Reform Act while avoiding due process question) *with United States v. Hagmann*, 950 F.2d 175, 187 (5th Cir.1991), *cert. denied*, —— U.S. ——, 113 S.Ct. 108, 121 L.Ed.2d 66 (1992) (finding that cost-of-incarceration fines are rational means to assist victims of crime collectively). In declaring guideline § 5E1.2(i) invalid, the Third Circuit found that the plain language of the section indicated that the fines imposed thereunder were to reimburse the government for the costs of imprisonment. *Spiropoulos*, 976 F.2d at 166. The court concluded that the Sentencing Reform Act did not authorize fines to cover costs of confinement, even though the money collected from the fines went to the Crime Victims Fund and not actually to pay for penal operations. *Id.* at 166-67.

We disagree with the assertion that Congress did not consider imposition of cost-of-confinement fines to be within the scope of the Sentencing Reform Act's goal of restitution. *See* 18 U.S.C.A. § 3572(a)(6) (West Supp.1995) (providing that courts can consider "the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence" in setting amount of fine); 28 U.S.C.A. § 994(y) (West Supp.1995) (stating that Sentencing Commission may include as component of fine calculus the expected costs of imprisonment). Instead, we find *Hagmann* to be persuasive. We agree with the Fifth Circuit that "the uniform practice of fining criminals on the basis of their individualistic terms of imprisonment—an indicator of the actual harm each has inflicted upon society—is a

rational means to assist the victims of crime collectively." *Hagmann*, 950 F.2d at 187.

Although the Third Circuit in *Spiropoulos* found the analysis in *Hagmann* to be "too facile," 976 F.2d at 168, *Spiropoulos* has been rejected, and *Hagmann* followed, in every other circuit that has addressed the issue. *See, e.g., United States v. Zakhor*, 58 F.3d 464, 466 (9th Cir.1995) (upholding cost of confinement fines); *United States v. May*, 52 F.3d 885, 891 (10th Cir.1995) (finding guideline rationally related to legitimate government interest); *United States v. Leonard*, 37 F.3d 32, 39 (2d Cir.1994) (citing *Hagmann* and holding § 5E1.2(i) consistent with 18 U.S.C. § 3553(a)); *United States v. Turner*, 998 F.2d 534, 538 (7th Cir.1993) (holding that § 5E1.2(i) is authorized by statute), *cert. denied*, — U.S. —, 114 S.Ct. 639, 126 L.Ed.2d 598 (1993). We join the other circuits that have upheld U.S.S.G. § 5E1.2(i), and we reject both constitutional challenges made by the Prices.

2. Upward Departure Granted by the District Court

The trial court found that the Prices' crimes went beyond the "heartland" of typical cases, *see* U.S.S.G. § 5K2.0, and departed upward by two levels from the applicable guidelines in calculating their sentences. (R.31 at 103.) In deciding that this case merited departure, the court found that three aspects of the Prices' activities were not adequately considered by the guidelines: (1) their extreme conduct, including the fact that harassment of Leon Capouano was motivated by racial and ethnic prejudice, and that the Prices planned to mutilate IRS agent Dwight Huff; (2) the risk of harm to innocent bystanders because of the plan to blow up

Capouano's law firm; and (3) the extreme psychological injury to Kenny Price and other victims.[8] The court treated these factors as a group, assigning no relative weight to one factor over another in making the decision to depart from the guidelines. The Prices challenge the departure, arguing that the sentencing guidelines adequately considered all aspects of their crimes, and that there was insufficient factual support for the trial court's findings. The government originally moved for a four-level departure, but on appeal urges us to affirm the two-level departure as reasonable.

[8] In sentencing determinations, a court may impose a sentence outside the range established by the guidelines, if the court finds that "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b) (1988). We review such departures by applying a three-step analysis. *United States v. Dailey,* 24 F.3d 1323, 1325 (11th Cir.1994) (citing *Weaver,* 920 F.2d at 1573). We review de novo a decision as to whether the guidelines adequately consider a particular factor so as to preclude a sentencing court's reliance on it as a basis for departure. *Id.* Second, we review the factual findings underlying the trial court's decision to depart for clear error. *Id.* Finally, we review the departure itself for reasonableness. *Id.; accord United States v. Passmore,* 984 F.2d 933, 937 (8th Cir.1993) (holding that extent of upward departure is a "judgment call" by district court). We deal with each factor relied upon by the trial court in turn.

a. Extreme conduct (racial/ethnic motivation for crimes;

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[8] (R.Ex. 210 at 6 (John Price), 208 at 6 (David Price).)

planned mutilation of victims)

The Prices do not challenge the trial court's determination that racist or anti-semitic motivation for a crime was a proper basis for departure.[9] Instead, they argue that their actions were not racially or ethnically motivated, and that it was clear error for the trial court to find that they were. Our review, then, is limited to determining whether the trial court's factual findings are clearly erroneous.

[9] We find no clear error in the trial court's finding that the Prices were motivated by ethnic hatred in their harassment of Leon Capouano. While it is true that the court, as well as the government, acknowledged that two primary motivators for the Prices' conduct were greed and business litigation, the trial court concluded that racial and ethnic prejudice also played a part. *See McAninch,* 994 F.2d at 1388 (affirming trial court's conclusion that hatred was motivator of crime despite evidence that psychological problems could have been the cause). The Prices knew that Capouano was Jewish, and when they vandalized his home they painted swastikas and anti-semitic and racist remarks designed to strike at his religious heritage. The Prices also made repeated anti-semitic remarks about Capouano and Jews in general. While the Prices counter that any racist and anti-semitic con-

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[9] While we do not reach the issue here, we note that other circuits have allowed departures based on racist or anti-semitic motivation. *See e.g., United States v. McAninch,* 994 F.2d 1380, 1387-89 (9th Cir.) (holding that defendant's racist motivation is valid ground for departure because it is not otherwise treated in guidelines), *cert. denied,* —— U.S. ——, 114 S.Ct. 394, 126 L.Ed.2d 342 (1993); *United States v. Salyer,* 893 F.2d 113, 115-16 (6th Cir.1989) (race of victim could be considered under U.S.S.G. § 3A1.1 where defendant tailored actions to exploit special vulnerability of African-American family to cross burning).

duct was impulsive and isolated, there is evidence that the Prices put some thought into what they did and how they did it. *See United States v. Sanders,* 41 F.3d 480, 485 (9th Cir.1994) (holding that racist and anti-semitic letters, though short and simplistic, evidenced deliberation where defendant had to look up addresses and tailor each message to the group he was attacking), *cert. denied,* —— U.S. ——, 115 S.Ct. 2010, 131 L.Ed2d 1009 (1995).

[10] As for the proposed mutilation of IRS agent Dwight Huff, the Sentencing Commission did not adequately provide for such a grisly variety of the crime when it designed the applicable guidelines for conspiracy, solicitation, or murder-for-hire. *See* U.S.S.G. § 5K2.8 (allowing departure where defendant's conduct was unusually heinous, cruel, brutal, or degrading to victim). As the trial court concluded, these crimes were more depraved than the typical cases the guidelines were designed to cover, so that a departure based in part on the proposed mutilation of Huff was warranted. Further, we find no clear error in the trial court's underlying factual findings. John Price explicitly ordered Huff's "well-damaged carcass" in a taped conversation with the FBI.

b. Risk of harm to innocent third parties

[11] The trial court held that the potential for "injury even to the point of death" to a multitude of unknown victims as a result of the defendants' criminal activity was a factor not adequately considered in the applicable guidelines. (R. 31 at 104.) The factual predicate to this holding was the probability of injury to innocent bystanders had the scheme to blow up Leon Capouano's law office succeeded. The Prices argue that any risk to bystanders was already taken into account by the guidelines.

We first examine the guidelines to determine whether the district court correctly concluded that the danger to innocent bystanders from a bombing was not adequately considered. Reading U.S.S.G. § 2K1.4, we agree with the Prices that the risk of harm to third parties is already incorporated into the guideline applicable to property damage caused by explosives. The presentence investigation reports explicitly applied guideline § 2K1.4(a)(1), which provides for a greater base offense level where the crime "created a substantial risk of death or serious bodily injury *to any person other than a participant in the offense...*" (emphasis added). This includes people caught inside a building as well as bystanders injured in a blast. There may well be bombing cases involving risks to third parties of a kind outside the "heartland" of such cases. But the government points to nothing in the record demonstrating that this is such a case. As a result, we hold that the trial court misapplied the guidelines to the extent that the risk to third parties was double-counted; the court's reliance on the harm to innocent bystanders was thus misplaced as a ground for departure.

c. Extreme psychological injury to Kenny Price

[12] The Prices also challenge the court's reliance on its finding of extreme psychological harm to several of the victims, most notably Kenny Price, as a basis for upward departure. The Prices do not question the court's capacity to increase their sentences where their victims suffered severe psychological injury. *See* U.S.S.G. § 5K2.3. They only argue that the evidence introduced by the government did not show that Kenny Price or the other victims suffered an "injury much more serious than that normally resulting" from being a target for murder. *See* U.S.S.G. § 5K2.3, p.s.

Our review, then, is limited to reviewing the court's factual findings for clear error.

To be sufficiently severe to warrant a departure, there must be "a substantial impairment of the intellectual, psychological, emotional, or behavioral functioning of a victim" likely to last for an extended duration and to manifest itself by physical or psychological symptoms, or by changes in behavior. U.S.S.G. § 5K2.3. *See United States v. Wilson,* 993 F.2d 214, 218 (11th Cir.1993) (stating that "[w]e that feelings of foolishness, anger, or disappointment are so far beyond the heartland of fraud offenses" to rise to the level of extreme psychological harm). While we have never decided the extent of harm needed to show "extreme psychological injury," other circuits have affirmed trial courts that departed from the guidelines based on factual findings similar to those in this case. *See, e.g., United States v. Anderson,* 5 F.3d 795, 804-805 (5th Cir.1993) (upholding departure based on letter of victim describing "her ordeal and its effects on her life"), *cert. denied,* —— U.S. ——, 114 S.Ct. 1118, 127 L.Ed.2d 428 (1994); *United States v. Miller,* 993 F.2d 16, 21 (2d Cir.1993) (upholding departure where victim was afraid to answer phone, open mail, or stay in New York area).

Upon review of the presentence investigation reports (PSIs), we cannot say that the trial court clearly erred in finding that several of the victims suffered severe psychological injuries of the type addressed by U.S.S.G. § 5K2.3. The PSIs state that this ordeal was very traumatic for Kenny Price. He attended counseling sessions, and at one point contemplated suicide. Kenny suffered from depression, and he stated that he no longer felt safe in his home or when he went anywhere. IRS agent Dwight Huff stated in the PSIs

that his whole family changed their lifestyle to be "extra cautious of their surroundings," and he also said that his children were psychologically affected. Leon Capouano and David Hawthorne installed security systems in their houses and also restricted their activities outside their homes after the incidents at issue in this case. We find no error in the trial court's reliance on this evidence of extreme psychological injury as a basis for upward departure under U.S.S.G. § 5K2.3.

d. Reasonableness of the two-level upward departure

[13] Our final task in weighing the trial court's decision to depart is to evaluate the overall departure for reasonableness. *Dailey,* 24 F.3d at 1325. The trial court did not separately assign a departure level to each ground in ordering an overall departure of two levels. In light of our determination that one of the three grounds for the departure was already considered in the relevant guidelines, we are unable to say that the overall departure would have been the same based only on the other two grounds. *See Williams v. United States,* 503 U.S. 193, 202-03, 112 S.Ct. 1112, 1120-21, 117 L.Ed.2d 341 (1992). Therefore, we vacate the sentence and remand to the district court for resentencing consistent with this opinion.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the Prices' convictions; we VACATE their sentences and REMAND for resentencing.

CONVICTIONS AFFIRMED; SENTENCES VACATED and REMANDED for RESENTENCING.

APPENDIX B

[DO NOT PUBLISH]
Filed
U.S. Court of Appeals
Eleventh Circuit
November 3, 1997
Thomas Kahn
Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-6954
Non-Argument Calendar

D.C. Docket No. CR-93-57-N(01)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN G. PRICE,
DAVID G. PRICE,

Defendants-Appellants,

Appeals from the United States District Court
for the Middle District of Alabama

(November 3, 1997)

Before TJOFLAT, ANDERSON AND COX, Circuit Judges.

PER CURIAM:

FACTS AND PROCEDURAL HISTORY

Appellants John and David Price were convicted by a jury of conspiracy to commit murder and using interstate commerce facilities with the intent to commit murder-for-hire. In calculating the Prices' sentences, the district court departed upward two levels because of the racial and ethnic motivation behind the crimes, the planned mutilation of a victim, the severe psychological injury to the victims, and the threat of harm to third parties. The Prices appealed their convictions and sentences, contesting, among other issues, the two-level upward departure. On appeal, we found, inter alia; that the district court's reliance on harm to innocent bystanders as a ground for the upward departure was misplaced because this ground was already incorporated into the relevant sentencing guidelines. United States v. Price, 65 F.3d 903, 911 (11th Cir. 1995), cert denied, 116 S.Ct. 2547 (1996). Because the district court did not separately assign a departure level to each ground in ordering an overall departure of two levels, we were unable to find that the overall departure would have been the same based only on the other grounds. Id. At 912. Therefore, we affirmed the Price's convictions, vacated their sentences, and remanded to the district court for resentencing consistent with our opinion. Id. On remand, the district court resentenced the Prices to the same sentences they had previously received by applying a two-level upward departure based on the racial/ethnic motivation behind the crimes and planned mutilation of a victim, U.S.S.G. §5K2.8, and based on the extreme psychological injury to the planned victims, U.S.S.G. §5K2.3.

DISCUSSION

A. Upward departure based upon extreme conduct and extreme psychological injury.

The Prices challenge the district court's two-level upward departure based upon the Prices' extreme conduct and the extreme psychological injury to the victims. First, the Prices argue that the district court failed to make the required finding or utilize the correct standard of proof under recently amended §3A1.1, which now addresses racial/ethnic motivation for crimes by providing for a three-level increase in a defendant's base offense level if the finder of fact finds beyond a reasonable doubt that the defendant intentionally selected a victim based on actual or perceived race or ethnicity. U.S.S.G. §3A1.1 (amended Nov.1, 1995). [1] The Prices, in effect, argue that there should be no upward departure for the racial/ethnic motivation behind the crime because the district court, in resentencing, did not make the required findings necessary for a three-level enhancement under amended §3A1.1.

On resentencing, a trial court must utilize the Sentencing Guidelines in effect at the time of resentencing unless application of the later version of the Guidelines would subject the defendants to a potentially harsher punishment and thus create an *ex post facto* problem. See United States v.

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The pre-amendment version of §3A1.1 only addressed crimes against a "vulnerable victim", and thus the district court in its original sentencing found that the racial/ethnic motivation of the Prices' crime was not taken into consideration by the Sentencing Guidelines and supported an upward departure outside the range established by the Guidelines. In the first appeal, the Prices did not challenge the district court's determination that racist or anti-Semitic motivation for a crime was a proper basis for departure, and thus we did not decide that issue. Price, 65 F.3d at 910 n.9 (however, noting that "other circuits have allowed departures based on racist or anti-Semitic motivation").

Munoz-Realpe, 21 F.3d 375, 377 n.4 (11th Cir. 1994); see also United States v. Gross, 979 F.2d 1048, 1052-53 (5th Cir. 1992). (instructing the district court to apply on remand an earlier version of the Sentencing Guidelines because application of the amended version could result in a harsher sentence); United States v. Fagan, 996 F.2d 1009, 1018 (9th Cir. 1993) (discussing cases from a number of circuits reaching same conclusion). Two reasons persuade us that the district court, in resentencing, correctly applied the old Guidelines, and did not consider pursuant to amended §3A1.1, whether beyond a reasonable doubt, the Prices selected the victim based on his ethnicity. First, the new Guidelines could have resulted in imposing a harsher sentence (a three level enhancement instead of a two-level departure) on the Prices. Second, the district court properly remained within the limited mandate on remand and only properly considered if the Prices' extreme conduct and the extreme psychological injury to the victims warranted the two-level upward departure. See United States v. M.C.C. of Florida, Inc., 967 F.2d 1559, 1562 (11th Cir. 1992) (finding that upon remand, a district court's authority is limited by the scope of the mandate issued by an appellate court).

The Prices also argue that no departure was warranted for extreme psychological injury to the victims and for the planned mutilation of a victim because the injuries were never sustained or were sustained due to acts by others. The Prices made these same arguments on the first appeal and we rejected them at that time. See Price, 65 F.3d at 912 (concluding that "[W]e find no error in the trial court's reliance on this evidence of extreme psychological injury as a basis for upward departure" and that "a departure based on the planned mutilation of [a victim] was warranted"). Under the law of the case doctrine:

> An appellate decision binds all subsequent proceedings in the same case not only as to explicit rulings, but also as to issues decided necessarily by implication on the prior appeal. . . . Accordingly, "[a] district court when acting under an appellate court's mandate, 'cannot vary it, or examine it for apparent error, upon a matter decided on appeal . . . .'" "The mandate rule is simply an application of the law of the case doctrine to a specific set of facts."

United States v. Tamayo, 80 F.3d 1514, 1520 (11th Cir. 1996) (citations omitted). However, there are "narrow exceptions" to the law of the case doctrine in that, on remand, a district court may deviate from an appellate mandate where new evidence or an intervening change in controlling law dictates a different result, or the appellate decision, if implemented, would cause "manifest injustice because it is clearly erroneous." Id.

In arguing that no departure was warranted for the extreme psychological injury to the victims and for the planned mutilation of a victim, the Prices do not cite any cases that have changed the controlling authority in this jurisdiction, do not discuss any new evidence on this issue, and do not prove that our rejection of these arguments on the first appeal was "clearly erroneous". Therefore, none of the exceptions to the law of the case doctrine apply, and the district court properly rejected these arguments in resentencing.

B. The Prices' other contentions

The Prices contend that the district court, in the original sentencing and in the resentencing, erred in (1) enhancing John Price's base offense level based on significant planning and

threat of severe harm to a victim; (2) not granting a downward departure based on the alleged imperfect entrapment of the defendants; and (3) imposing consecutive ten year sentences that amounted to a life sentence in alleged violation of 18 U.S.C. §1958. The Prices could have raised these arguments on the first appeal, but they failed to do so. Our remand to the district court was limited and the Prices' entire sentencing packages were not to be revisited on remand. Price, 65 F.3d at 912; see Tamayo, 800 F.3d at 1519-20 n.7 (finding that the Eleventh Circuit "has been explicit when it is vacating an entire sentencing package as opposed to remand for sentencing on a single issue"). The Prices are deemed to have waived those arguments that they raise for the first time on this appeal, and therefore, we will not consider the arguments. United States v. Fiallo-Jacome, 874 F.2d 1479, 1481-83 (11th Cir. 1989) (holding that a defendant who failed to raise an issue on the first appeal waived his right and should not "get two bites at the appellate apple"); United States v. Escobar-Urrego, 110 F.3d 1556, 1561 n.5 (11th Cir. 1997) (noting that "litigants who have never raised an issue have been held to have waived the issue for subsequent stages of the same litigation").

Finally, the Prices contend that we should reconsider whether the sentencing judge erred in failing to recuse himself. We already considered this argument in the first appeal and found the argument to be "without merit." Price, 65 F.3d at 907 n.6. The Prices do not argue that there is any new evidence nor a change in the controlling authority on this issue. Therefore, the law of the case doctrine applies to this issue, and we are bound by our earlier decision. Tamayo, 80 F.3d at 1520. For the foregoing reasons, the district court's judgement is affirmed.

Affirmed. [2]

2Appellants' request for oral argument is denied.

APPENDIX C

Filed
U.S. Court of Appeals
ELEVENTH CIRCUIT
APR-2 1998
Thomas K. Kahn
Clerk

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-6954

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOHN G. PRICE,
DAVID G. PRICE,

Defendants-Appellants.

On appeal from the
United States District Court
for the Middle District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__,
___F.2d ____).

Before TJOFLAT, ANDERSON and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no number of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

[signed]

_____

United States Circuit Judge

ORD-42
(6/95)

APPENDIX D

FIFTH AMENDMENT, U.S. CONSTITUTION

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

APPENDIX E

18 U.S.C. 3553

§ 3553 Imposition of a sentence

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider–

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed–

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the

994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence—The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(c) Statement of reasons for imposing a sentence—The Court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular

sentence, and, if the sentence–

(1) is of the kind, and within the range, described in subsection (a)(4), and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, and within the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons to the Probation System, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.—Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall–

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order.

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.—Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

APPENDIX F

§5K2.8 **Extreme Conduct** (Policy Statement)

If the defendant's conduct was unusually heinous, cruel, brutal, or degrading to the victim, the court may increase the sentence above the guideline range to reflect the nature of the conduct. Examples of extreme conduct include torture of a victim, gratuitous infliction of injury, or prolonging of pain or humiliation.

[1993 and 1995 Guidelines Manual]

APPENDIX G

§3A1.1 **Hate Crime Motivation or Vulnerable Victim**

(a) If the finder of fact at trial or, in the case of a plea of guilty or nolo contendere, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, increase by 3 levels.

(b) If the defendant knew or should have known that a victim of the offense was unusually vulnerable due to age, physical or mental condition, or that a victim was otherwise particularly susceptible to the criminal conduct, increase by 2 levels.

(c) Special Instruction

(1) Subsection (a) shall not apply if an adjustment from §2H1.1(b)(1) applies.

[November 1, 1995, Guidelines Manual]